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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JERONE ANTOINE SHELL,

Defendant and Appellant.

B245855

(Los Angeles County
Super. Ct. No. MA055229)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Murphy, Commissioner. Affirmed.

Joshua L. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Rene Judkiewicz, Deputy Attorney General, for Plaintiff and Respondent.

SUMMARY

Appellant Jerone Shell contends the trial court abused its discretion in refusing to strike one or more of his prior strike convictions. We affirm.

PROCEDURAL BACKGROUND

By amended information, Shell was charged with three counts of second degree robbery (Pen. Code, § 211¹; counts 1, 2 & 5), two counts of possession of a firearm by a felon with two prior convictions (§ 29800, subd. (a)(1); counts 3 & 4), and one count of dissuading a witness by threat or force (§ 136.1, subd. (c)(1); count 6). The information alleged that Shell personally used a firearm in the commission of counts 1, 2, 5 and 6. (§§ 12022.5, subd. (a), 12022.53, subd. (b).) The information also alleged that Shell had suffered two prior serious or violent felony convictions or juvenile adjudications within the meaning of the “Three Strikes” law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and had suffered two prior serious felony convictions in 1998 (§ 667, subd. (a)(1)). Shell pleaded not guilty and denied the allegations.

A jury found Shell guilty as charged, and found the firearm use allegations true. Shell waived his right to a jury trial as to his prior strike convictions, which he admitted suffering. At sentencing, the court declined Shell’s request that it exercise its discretion under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 to strike at least one of his prior strike convictions.

Shell was sentenced to a total of 210 years to life as follows: on counts 1, 2, 5 and 6 each, 25 years to life in prison, plus consecutive five-year enhancements under section 667, subdivision (a)(1), and consecutive 10-year enhancements under section 12022.53, subdivision (b); on counts 3 and 4 each, consecutive sentences of 25 years to life. The court gave appellant 377 days of total custody credit (327 actual days plus 50 days of conduct credit). The trial court subsequently recalled the sentences on counts 3, 4 and 6, and resentenced Shell as follows: as to count 3, the midterm of two years doubled; on count 4,

¹ Undesignated statutory references are to the Penal Code.

one-third the midterm of 24 months (eight months) doubled (16 months); and corrected a clerical error as to count 6.²

FACTUAL BACKGROUND

On January 17, 2012, Heather Perkins was working at her job at “Advance America,” a payday advance and money order business, when a man whom she later identified as Shell came to the locked front door. After motioning for Shell to take off the hat he wore, Perkins buzzed him into the store.

Shell asked Perkins if the store issued money orders. Perkins, who was new, said it did and went to find out how. When she returned to the counter, Shell was looking around the store as if to see if anyone was there. He approached the counter, pointed a gun at Perkins and ordered her to “[o]pen the drawer.” Perkins gave Shell the money in the cash register. Pointing his gun at Perkins’s head, Shell then ordered her to open the business’s safe. Shell took cash and prepaid credit gift cards from the safe. He also took Perkins’s wallet, purse and cell phone.

Before leaving, Shell told Perkins, “‘you made me take my hat off. I know you took my picture.’ . . . ‘I have all your information.’ . . . ‘I will find you and I will kill you.’” Perkins estimated that Shell took about \$1,500 from the store. Perkins understood Shell’s statements to mean that he would find her if she called the police.³ Afterwards, Perkins remained terrified about the armed robbery, afraid to be alone and unable to sleep.

² The amended information correctly alleged personal firearm use as to count 6 under section 12022.5, subdivision (a). But the verdict form, minute order from the sentencing hearing and abstract of judgment erroneously list section 12022.53, subdivision (b), as the firearm enhancement for that count. Section 12022.53, subdivision (b) does not apply to violations of section 136.1. (§ 12022.53, subd. (a).) The trial court recalled Shell’s sentence in count 6 (§ 1170, subd. (d)), and imposed a consecutive 10-year determinate term for firearm use (§ 12022.5, subd. (a)).

³ A detective testified that during one of six or so interviews of Perkins after the robbery, she said Shell expressly threatened to kill her if she called the police.

Police took a still photo of the suspect from the store's surveillance video, and used a computer program to compare that photo to their database, where they found a photo of Shell. Perkins identified Shell's picture in a photographic six pack, and testified that she was 100 percent sure he was the perpetrator. She explained that the robber had a scar under his right eye; Shell had the same scar under his right eye. Perkins also confirmed that a driver's license, credit cards and receipts recovered by the police about a mile from the crime scene were taken from her purse.

On January 25, 2012, Shell's friend, Jessica Moore, drove him in her mother's white Oldsmobile to a shopping center with a "Mail America" store. Shell, who had a pistol with him at the time, said he was going to rob the store.

Shell entered the Mail America store where the owner Ejaz Ahmad and his employee Karla Palomera were working. He pointed a gun at Ahmad and demanded that he and Palomera give him the money in their cash registers. Palomera put the money into an envelope Shell took from a store shelf. Shell also took cell phones belonging to Palomera, Ahmad and the store. Ahmad and Palomera each identified Shell as the perpetrator.

Moore and Shell went to Moore's mother's apartment, where Shell told Moore he robbed the store, gave her some of the money he stole and left the gun.

Officers recovered fingerprints from an envelope the robber was seen touching on Mail America's surveillance video. An expert testified that he compared those fingerprints to Shell's fingerprints stored in a police database, and to fingerprints taken from Shell at trial; all three matched. Ahmad and Palomera confirmed that two cell phones found by the police in a trash can near the Mail America store were their cell phones that Shell had taken.

The police also took a photo of a white car, later identified as belonging to Moore's mother, from a January 25, 2012 surveillance video taken at another business in the shopping center. They found the car in a lot at Moore's mother's apartment building and watched it until they saw two people get in and drive away. Officers pulled the car over and arrested Moore and Shell. In a subsequent search of Moore's mother's apartment, police found a grey sweatshirt like the one the perpetrator had worn in the surveillance video, an envelope, a handgun, eight bullets and a holster. Moore, Ahmad and Palomera each identified the

sweatshirt as the one Shell wore during the robbery.⁴ Moore and Palomera each testified that the handgun looked like the gun that Shell had used during the robbery. Palomera confirmed that the envelope the police recovered was the same as the one Shell handed her during the robbery, and identified Shell in a photo six pack.

Business surveillance videos of both incidents were played for the jury. Shell stipulated to a prior felony conviction for the purposes of counts 3 and 4.

Shell did not testify or present any evidence.

DISCUSSION

At sentencing, Shell’s counsel asked the trial court to exercise its discretion under *Romero* to strike at least one of his prior strikes. The trial court declined to do so, observing that it was “mindful of the trial testimony . . . [and that it] . . . considered [Shell’s] prior convictions, one . . . for attempted carjacking, the other, carjacking, serious and violent felonies” The court determined that Shell was a person “who is within the contemplation” of the Three Strikes law. Shell argues that the court’s denial of his *Romero* motion was an abuse of discretion. We disagree.

1. Legal standard

In *Romero*, the Supreme Court explained that, under section 1385, a trial court may strike or vacate an allegation or finding under the Three Strikes law that a defendant has previously suffered a serious and/or violent felony conviction. (*Romero, supra*, 13 Cal.4th at p. 504.) The court’s exercise of its discretion to dismiss strikes in the furtherance of justice ““requires consideration both of the constitutional rights of the defendant, and the interests of society represented by the People”” (*Id.* at p. 530, italics omitted.)

In *People v. Williams* (1998) 17 Cal.4th 148 the Supreme Court articulated the standard for striking prior convictions: “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own

⁴ Moore, charged with aiding and abetting the robbery, pleaded no contest to one count of being an accessory to a robbery. (§ 32.) She was sentenced to five years probation; a condition of probation was to truthfully testify at trial.

motion, ‘in furtherance of justice’ pursuant to Penal Code section 1385[, subdivision] (a), or in reviewing such a ruling, the court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. If it is striking or vacating an allegation or finding, it must set forth its reasons in an order entered on the minutes, and if it is reviewing the striking or vacating of such allegation or finding, it must pass on the reasons so set forth.” (*Id.* at p. 161.)

“[T]he [T]hree [S]trikes law not only establishes a sentencing norm, it carefully circumscribes the trial court’s power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper. [¶] In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances.” (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) Therefore, “[b]ecause the circumstances must be ‘extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the [T]hree [S]trikes scheme must be even more extraordinary.” (*Ibid.*) The court should not dismiss or vacate a “strike” unless it concludes that the defendant may be deemed to be outside the anti-recidivist “spirit” of the Three Strikes law. (*People v. Williams, supra*, 17 Cal.4th at p. 161.)

A trial court’s decision to deny a *Romero* motion is reviewed for abuse of discretion. (*People v. Carmony, supra*, 33 Cal.4th at pp. 374–376.) It is the appellant’s burden as the party attacking the sentencing decision to show that it was arbitrary or irrational. The trial court’s refusal to dismiss one or more prior convictions will not be reversed on appeal unless reasonable minds could not differ about the existence of “extraordinary” circumstances

showing the career criminal falls outside the spirit of the Three Strikes law. (*Id.* at p. 378; *People v. Philpot* (2004) 122 Cal.App.4th 893, 905.) Absent such a showing, we presume the trial court ““acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside.”” (*Carmony*, at pp. 376–377.) “Where the record is silent [citation], or ‘[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling, even if we might have ruled differently in the first instance’ [citation].” (*Id.* at p. 378.)

2. *Shell’s Romero motion*

Shell challenges the trial court’s exercise of discretion primarily on two grounds. First, he claims he is not a recidivist. Second, he argues that, even if the court had agreed to strike one or both of his strikes, he would still spend a substantial amount of time in prison for the current offenses. Neither aspect of Shell’s argument has merit.

Shell maintains that the trial court’s sentencing decision was an abuse of discretion because he is not a recidivist. Shell was charged with, and admitted, prior strike convictions in 1998 for carjacking and attempted carjacking, which arose from a single case. (Pen. Code, §§ 215, 664.) These convictions occurred about 14 years before the instant convictions, when Shell was 17 years old. He was tried as an adult and sentenced to 70 months in prison. In addition to two nonserious, nonviolent sustained juvenile petitions, Shell’s criminal history consists of a 2001 conviction for the nonstrike offense of possession of cocaine base for sale (Health & Saf. Code, § 11351.5). Shell also asserts that he spent a “substantial amount of time” out of custody before being charged with the felonies here. Finally, he maintains that, depending on whether the trial court agreed to dismiss one or both of his prior strikes, he could still have received a very lengthy prison sentence (up to 41 years) for the current convictions.

We find no abuse of discretion. The record reflects that the court expressly agreed with the prosecutor’s assertion that the facts of this case did not militate in favor of granting Shell’s *Romero* motion. The court, aware of its sentencing discretion, articulated that it had considered the trial testimony and the fact that Shell’s prior convictions for carjacking and

attempted carjacking were for serious and violent felonies. That Shell was 17 years old at the time of his 1998 convictions does not warrant striking those convictions. On the contrary, it may be considered a long-standing history of engaging in dangerous crimes. Nor does the remoteness of the strikes or the fact that they arose out of the same case suggest that the court abused its discretion in denying the *Romero* motion. Multiple prior offenses that constitute strikes may be considered as such for sentencing under the Three Strikes law, even if they arose out of the same incident or case. (*People v. Benson* (1998) 18 Cal.4th 24, 26, 30–36; *People v. Philpot*, *supra*, Cal.App.4th at pp. 906–907.) And, the mere fact that a strike is remote in time is insufficient to grant a *Romero* motion without consideration of other factors, including but not limited to the subsequent commission of nonstrike crimes. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.)

In *People v. Philpot*, *supra*, 122 Cal.App.4th 893, the court rejected arguments similar to Shell’s. There, the defendant argued the trial court abused its discretion in denying his *Romero* motion because, among other things, “his prior strikes were remote and stemmed from a single case . . . [and] he had not been convicted of any strike offenses in the interim.” (*Id.* at p. 906.) The court found no abuse of discretion, concluding that the record showed that the trial court considered all appropriate factors in concluding that the defendant fell within the spirit of the Three Strikes law. (*Id.* at pp. 906–907.)

So too here. On this history, coupled with testimony from the victims of the armed robberies, the court was within its rights to conclude that Shell is the type of recidivist felon the Three Strikes law was intended for. Shell failed to establish the existence of “‘extraordinary . . . [circumstances] by which a career criminal [may] be deemed to fall outside the spirit of the [Three Strikes Law].’” (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378; *People v. Philpot*, *supra*, 122 Cal.App.4th at p. 905.)

We reject Shell’s assertion that the spirit of the Three Strikes law does not apply to him because he did not commit serious or violent “strike” felonies after his 1998 convictions. Shell was convicted in 2001 of possession of cocaine base for sale. By its nature, drug dealing is a dangerous criminal activity and often involves a risk of serious violence. Shell implicitly concedes the veracity of the trial court’s finding that his prior strike convictions

involve crimes that are both violent and serious felonies under the California Three Strikes law. His attempt to minimize the seriousness of 2001 conviction for drug sales is unavailing. Justice Kennedy, in his concurrence in *Harmelin v. Michigan* (1991) 501 U.S. 957, identified potential significant harmful impacts of drug use and drug dealing on society, stating that the “distribution of illegal drugs represent[s] ‘one of the greatest problems affecting the health and welfare of our population.’ [Citation.]” (*Id.* at p. 1002.) “Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in” several ways, including the fact that “[a] violent crime may occur as part of the drug business or culture.” (*Ibid*; see also *People v. Bland* (1995) 10 Cal.4th 991, 1005 [“Drug dealers are known to keep guns . . . ready access to a gun is often crucial to a drug dealer’s commercial success”].) Shell’s 2001 conviction shows he had not truly rehabilitated from his teenage years and continued to engage in increasingly dangerous criminal conduct. We also reject Shell’s claim that he is not a recidivist because he spent a “substantial amount of time” out of custody before being charged. In 1998, he was sentenced to almost six years in prison for the carjacking offenses. In 2001, he was sentenced to six years in prison for the felony narcotics conviction. Shell was incarcerated for a significant portion of the period between his 1998 carjacking related convictions and his commission of the armed robberies in 2012. His opportunities to reoffend during that 14 year period were obviously significantly reduced.⁵

Here, the circumstances evaluated by the trial court—including the specifics of the current offenses, the nature of the serious and violent prior strike offenses and the evidence of Shell’s criminal record—led to its conclusion that Shell did not fall outside the letter or spirit of the Three Strikes sentencing scheme. Nothing indicates that the trial court’s ruling

⁵ Shell also argues that he would still have been punished for his prior strike convictions by the mandatory consecutive five-year enhancement. (§ 667, subd. (a).) But this argument ignores the Legislature’s intent to provide for sentencing under the Three Strikes law plus applicable enhancements. (*People Acosta* (2002) 29 Cal.4th 105, 130–131.)

was not impartial or that it considered any improper factors. (See *People v. Philpot*, *supra*, 122 Cal.App.4th at p. 906.) Shell’s disagreement with the trial court’s view of his criminal history and gravity of his offenses does not render the court’s ruling arbitrary or irrational. At best, Shell has shown that reasonable people could disagree on whether to strike one or more of his prior convictions. But, an appellant does not carry his significant burden on appeal by merely showing reasonable people might disagree on this point. (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378.)

This case does not present an “extraordinary” circumstance and does not warrant a finding that Shell should be “deemed to fall outside the spirit of the very [Three Strikes] scheme within which he squarely falls” (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378.) In the absence of such extraordinary circumstances, we cannot say that the trial court abused its discretion by refusing to strike one or more of Shell’s prior strike offenses.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.